Attachment A

Pls. Stamp & Return

ORAL ARGUMENT REQUESTED

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 98-9518

U S WEST, INC.,

Petitioner.

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

BELLSOUTH CORPORATION and
SBC COMMUNICATIONS INC., *et al.*,

Intervenors.

On Petition for Review of an Order
of the Federal Communications Commission

BRIEF FOR PETITIONER AND INTERVENORS

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner U S WEST and Intervenors BellSouth Corporation and SBC Communications Inc. submit the following corporate disclosure statements:

U S WEST, Inc.

On June 12, 1998, the former U S WEST, Inc. (subsequently renamed MediaOne Group, Inc.) consummated a transaction whereby it was separated into two independent companies. The former U S WEST, Inc. had conducted its businesses through two groups, the U S WEST Communications Group ("Communications Group") and the U S WEST Media Group ("Media

Group"). Pursuant to the separation, the former U S WEST, Inc. contributed the businesses of the Communications Group and the domestic directories business of the Media Group ("Dex") to USWC, Inc. (which was subsequently renamed U S WEST, Inc. and is referred to as follows as "U S WEST"). As a result of the separation, U S WEST became an independent company conducting the businesses of the Communications Group, Dex and other subsidiaries. MediaOne Group, Inc. continues as an independent company conducting the businesses of the Media Group other than Dex.

U S WEST is a publicly-held corporation that provides services to the public only through its operating subsidiaries. U S WEST is the parent holding company of U S WEST Communications, Inc., a local exchange carrier that provides local exchange telecommunications, exchange access, wireless, and long distance services pursuant to tariff and contract in 14 western and mid-western states (formerly separately incorporated as The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company).

The following U S WEST entities have securities in the hands of the public:

U S WEST, Inc.
U S WEST Communications, Inc.
U S WEST Capital Funding, Inc.

U S WEST owns other subsidiaries that market unregulated products and services, none of which has issued debt or stock to the public.

BellSouth Corporation

BellSouth Corporation is a publicly held corporation and has equity securities in the hands of the public. It is principally in the business of providing communications services and products to the general public. BellSouth Corporation's wholly owned subsidiaries have issued debt securities to the public as obligations of BellSouth Telecommunications, Inc., Southern Bell

Telephone and Telegraph Company, South Central Bell Telephone Company, Harbinger Corporation, Tele 2000 S.A., BellSouth Capital Funding Corporation, BellSouth Savings and Security ESOP Trust, and BellSouth Savings and Employee Stock Ownership Trust.

SBC Communications Inc.

SBC Communications Inc. (formerly Southwestern Bell Corporation) is a publicly held corporation with equities and debt in the hands of the general public. The principal directly and indirectly held subsidiaries of SBC Communications Inc. include Pacific Telesis Group; Pacific Bell; Nevada Bell; Southwestern Bell Telephone Company; SBC Wireless, Inc.; Southwestern Bell Yellow Pages, Inc.; Pacific Bell Directory; and SBC International, Inc. The subsidiaries of SBC Communications Inc. are principally engaged in the business of providing communications services and products to the general public.

SBC Communications Inc., Southwestern Bell Telephone Company, and SBC Communications Capital Corporation have publicly held debt. A trust established and funded by Pacific Telesis Group has issued "Trust Originated Preferred Securities" to the public. Pacific Bell, Nevada Bell, and PacTel Capital Resources, subsidiaries of Pacific Telesis Group, have issued debt securities to the public. SBC and Pacific Telesis Group have guaranteed the repayment of certain trust originated preferred securities that have been issued to the public. In addition, certain indirectly held subsidiaries of SBC Wireless, Inc., have small groups of minority shareholders.

No other affiliates of SBC Communications Inc. have outstanding debt or equity securities that are publicly held.

SBC Communications Inc. currently anticipates completing its pending acquisition of Southern New England Telecommunications Corporation ("SNET") later this year.

Respectfully submitted,

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August 13, 1998

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STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(a), petitioner and intervenors certify that there are no prior or related appeals in this Court.

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On Petition for Review of an Order
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BRIEF FOR PETITIONER AND INTERVENORS

JURISDICTION

This action seeks review of an *Order* of the Federal Communications Commission ("FCC"): *Second Report and Order and Further Notice of Proposed Rulemaking: In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, FCC 98-27, CC Docket Nos. 96-115 and 96-149 ("*CPNI Order*"). The *CPNI Order* was released on February 26, 1998, with a summary published in the Federal Register on April

24, 1998. 63 Fed. Reg. 20326. The *CPNI Order* was also subsequently published in the FCC Record. 13 FCC Rcd. 8061 (1998). A timely petition for review was filed on May 18, 1998. This Court has jurisdiction of this petition for review pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATEMENT OF ISSUES

Whether the *CPNI Order* and accompanying rule amendments are, in whole or in part, arbitrary, capricious, an abuse of discretion, in violation of 47 U.S.C. § 222 and related provisions of the Communications Act as amended, or otherwise not in accordance with law.

Whether the *CPNI Order* and accompanying rule amendments are, in whole or in part, contrary to constitutional right, power, privilege or immunity in that they violate:

- the freedom of speech and press guaranteed by the First Amendment to the United States Constitution; and
- the takings and/or due process clauses of the Fifth Amendment to the United States Constitution.

Whether the *CPNI Order* and accompanying rule amendments are, in whole or in part, arbitrary, capricious and not in accordance with law in that the FCC failed adequately to consider the serious constitutional questions raised by the CPNI rules.

STATUTES AND REGULATIONS

47 U.S.C. § 222 and the Final Rules adopted pursuant to the *CPNI Order* are reprinted in the appendix to this brief.

STATEMENT OF THE CASE

A. Introduction

This case involves the FCC's rules preventing telecommunications carriers from using certain kinds of their business information to speak to their customers unless the carriers first obtain the customers' affirmative consent. For example, the FCC's rules preclude local telephone companies from using business information about their customers to determine

whether a specific customer would be interested in hearing about voicemail services or cellular or other wireless offerings, in the absence of the customer's prior affirmative consent permitting this information to be used for such a purpose.

More specifically, this case concerns FCC regulations implementing the otherwise self-effectuating Section 222 of the Federal Telecommunications Act of 1996, 47 U.S.C. § 222, which addresses Consumer Proprietary Network Information ("CPNI"). CPNI is valuable commercial information that a telecommunications carrier generates or accumulates in the course of doing business with individual members of the public. CPNI includes information about what telecommunications services customers purchase — such as number of lines, how they are used (for example, whether customers have three-way calling, call waiting, Caller I.D., or whether they make use of "star-69" for automatic redialing of the last number called), and information about calling patterns (for example, toll call detail.).[1] To telecommunications carriers, including local exchange, long distance, and wireless carriers, CPNI is comparable to the information that credit card companies, grocery stores, mail-order catalogs, banks, Internet service providers, and many other firms maintain about their customers' purchasing and usage characteristics, as part of their routine business operations.

As with other kinds of individually-identifiable customer information that companies collect and use within their business operations, CPNI allows telecommunications carriers to identify customers, on the basis of their past purchasing habits, who are most likely to be interested in particular new services, and to offer them information about packages of services through communications tailored to their individual needs. Without CPNI, if communications occur at all, they must take the form of blanket, undifferentiated, "broadcast-type" speech to any

[1] Section 222 defines CPNI as "(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the customer-carrier relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information." 47 U.S.C. § 222(f)(1).

and all customers, regardless of their individual service interests or needs. CPNI is thus essential for carriers to communicate with their customers effectively and to avoid undue intrusions on those individuals least likely to be interested in the communications.

In sum, this case involves the FCC's interposing itself into the service relationship between telecommunications carriers and their customers and interfering with protected speech and property rights. As will be demonstrated, that intrusion reflects a marked departure from well-settled regulatory policy, frustrates rather than reflects customers' expectations of their relationships with their existing carriers, and is in no way compelled by the statutory language or legislative history of Section 222. For these reasons, this Court should vacate the FCC's rules and remand the case for further consideration.

B. Regulatory History of FCC CPNI Rules

Prior to Congress' enactment of Section 222, the FCC had given extensive consideration to CPNI issues, although it had adopted rules only with regard to certain carriers and certain types of services. Throughout, the FCC had repeatedly rejected prior affirmative consent requirements for carriers in existing customer relationships. The FCC's rules generally permitted carriers to use CPNI to market new and innovative services without any expression of customer approval beyond that implied in the existing carrier-customer relationship. As a general rule, the FCC's rules were designed around periodic customer notifications and opt-out rights.

The FCC's CPNI rules were originally crafted when the Commission was considering whether to require certain carriers (AT&T and later the Bell Operating Companies ("BOCs")) to offer certain non-regulated services — customer premises equipment ("CPE") (such as telephone sets) and "enhanced services" (such as voicemail or Internet access) — through structurally separate subsidiaries.[2] The FCC ultimately decided *not* to require separate subsidiaries for these

[2] *See Second Computer Inquiry, Final Decision*, 77 FCC 2d 384, 481 (1980), *recon.*, 84 FCC 2d 50 (1980), *further recon.*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer & Communications Indus. Assn. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

non-regulated services,[3] and, in lieu of such separation, it established certain "competitive safeguards." CPNI rules were one of those safeguards.

The FCC's CPNI safeguards were limited to certain offerings by AT&T, the BOCs, and GTE.[4] Other carriers were free to use CPNI in any way they wished. Similarly, even for carriers subject to CPNI rules, services other than CPE, enhanced services, and certain cellular services were unaffected by the FCC's rules. For example, the FCC did not regulate CPNI use for credit card operations.[5]

Further, the FCC crafted its CPNI rules, where applicable, to avoid severe restrictions, such as a prior affirmative consent requirement, on the use of this valuable commercial

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[3] The Commission established a special rule with respect to cellular services offered by certain carriers, requiring that any carrier required to establish a separate cellular subsidiary was prohibited from providing CPNI to that subsidiary unless the CPNI was provided to others. 47 C.F.R. § 22.903(f).

[4] The BOCs, AT&T, and GTE were required to send annual notices of CPNI rights regarding enhanced services to all of their multi-line (2 or more lines) business customers. *Computer III Phase II Order*, 2 FCC Rcd. 3072, 3096 (1987); *Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corp.*, 9 FCC Rcd. 4922, 4944-45 (1994). With respect to CPE, the BOCs were required to send annual notices to multi-line business customers, and AT&T was required to provide a one-time notice to its WATS and private line customers. Each notice included a response form that allowed the customer to restrict access to CPNI from the carriers' enhanced services and/or CPE marketing personnel.

In addition, the BOCs and GTE (but not AT&T) were required to obtain prior written authorization from business customers with 20 or more access lines before using CPNI to market enhanced services (but not CPE). *Computer III Remand Order*, 6 FCC Rcd 7571, 7609 (1991), *vacated in part and remanded*, 39 F.3d 919 (9th Cir. 1994). This requirement was adopted only on the basis of extensive record evidence and a showing that the account partner relationship between such customers and their carrier made it relatively easy for the carriers to communicate with the customers and secure the requisite approval. *See Computer III Remand Order*, 6 FCC Rcd. at 7611 ¶ 86; *Communications Satellite Corporation Petition for Declaratory Ruling*, 8 FCC Rcd. 1531, 1535 n.39 (1993). The constitutionality of the Commission's 20-lines rule was never adjudicated. For a more complete history of the FCC's CPNI rules, see the FCC's *Notice of Proposed Rulemaking ("NPRM")* 11 FCC Rcd. 12513, 12516 ¶ 4, 12530 ¶ 40 (1996) and *CPNI Order* at ¶¶ 174-79.

[5] *See In the Matter of BankAmerica Corporation, The Chase Manhattan Corporation, Citicorp, and MBNA America Bank, N.A. v. AT&T Co., Memorandum Opinion and Order*, 8 FCC Rcd. 8782, 8787 ¶¶ 26-27 (1993) ("*Universal Card Order*").

information. The Commission did so, in substantial part, because it recognized that such burdens would themselves have posed a form of "passive" structural separation on the affected carriers.[6] Having rejected operational structural separation on the ground that it hindered the efficient delivery of telecommunications and related services to the public, the FCC did not want to resurrect such separation through severe limitations on the use of CPNI. Such limitations, the FCC recognized, would have hindered one-stop shopping and joint marketing, thus defeating the important federal goals of carrier efficiencies and customer convenience.

In the FCC's *Computer III Remand Order*, 6 FCC Rcd. 7571 (1991), for example, the FCC rejected a prior customer authorization rule for enhanced services, reasoning that a large majority of mass market customers would fail to respond to a request for authorization, and that the resulting restriction on CPNI would be inefficient and anticompetitive:

> **Under a prior authorization rule, a large majority of mass market customers are likely to have their CPNI restricted through inaction**, and in order to serve them the BOCs would have to staff their business offices with network-services-only representatives, and establish separate marketing and sales forces for enhanced services. Thus, a prior authorization rule would **vitiate** a BOC's ability to achieve efficiencies through integrated marketing to smaller customers . . . .

Id. at 7610 n.155 (emphasis added). The Commission preempted state CPNI rules that might require prior authorization, "determining that such state rules would effectively negate federal policies promoting both carrier efficiency and consumer benefits."[7] The Ninth Circuit upheld this preemption, opining that a contrary determination could impede the efficient development of marketing strategies "for small customers."[8] The court added:

> The FCC found that BOC access to CPNI is justified because it allows customers the benefit of one-stop shopping which is important to the development of a mass market in enhanced services. The FCC found that the BOCs are uniquely positioned to reach small customers, and that it would be economically infeasible

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[6] *Phase II Recon. Order*, 3 FCC Rcd. at 1173 n. 83.

[7] *NPRM*, 11 FCC Rcd. at 12522 ¶ 16 (describing prior Commission policy).

[8] *California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995).

> to develop a mass market for enhanced services if prior authorization was required for access to CPNI. **If small customers are required to take an affirmative step of authorizing access to their information, they are unlikely to exercise this option and thereby impair the development of the mass market for enhanced services in the small customer market.**[9]

A federal district court in Texas agreed. *See Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 812 F. Supp. 706, 709, 710 (W.D. Tex. 1993) (upholding FCC's conclusion that "prior authorization rules would require separation of . . . marketing personnel, defeating the goal of integration of all marketing forces" and the goal of "increasing the market for enhanced services").

Subsequently, when AT&T acquired McCaw's cellular operations in 1995, the FCC refused to bar AT&T from sharing its long-distance service CPNI with its new cellular affiliate, finding that neither customer privacy nor competitive equity warranted such a prohibition. The FCC cited "consumer choice and efficiency" as the basis for its ruling, reasoning that any customers with contrary desires could opt out.[10] The FCC vigorously defended this view on appeal,[11] and the D.C. Circuit upheld the Commission's determination that allowing

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[9] *Id.* at 931 (emphasis added).

[10] *In re Applications of McCaw and AT&T Co.*, 10 FCC Rcd. 11786, 11794 (1995). "[W]e expect that permitting AT&T to disclose the information at issue to its cellular affiliates will increase competition for cellular customers as those affiliates, BOC cellular affiliates, and other providers seek to improve service and/or lower prices to attract and retain customers." *Id.* at 11792. *See also AT&T/McCaw Proceedings, Order*, 9 FCC Rcd. 5836, 5886 ¶ 83 (1994) (prohibiting the sharing of CPNI between AT&T and McCaw "would undercut one of the benefits of the . . . combination: the ability . . . to offer its customers the ability to engage in 'one-stop shopping' for their telecommunications needs").

[11] On appeal, the FCC explained that "courts have consistently recognized that capitalizing on informational efficiencies . . . is not the sort of conduct that harms competition," and that it "is manifestly pro-competitive and beneficial to consumers to allow a multi-product firm . . . maximum freedom in offering its competitive services to all of its customers" by utilizing CPNI. Brief for Appellee FCC in *Southwestern Bell Corp. v. FCC*, Nos. 94-1637, 94-1639, at 49 (D.C. Cir. filed Feb. 13, 1995). The FCC explained that CPNI restrictions would undermine AT&T's ability to offer "one-stop shopping" by bundling long-distance and cellular service together — "a significant public benefit." *Id.* at 46. "'One-stop shopping' results from allowing the carrier to employ an integrated marketing and sales force. Denying those who market complementary products access to CPNI, in effect, requires two sales forces within the same company." *Id.* at

AT&T/McCaw to use AT&T's long-distance CPNI to solicit the cellular customers of competing providers would "lead to lower prices and improved service offerings." *SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1495 (D.C. Cir. 1995).

Hence, the FCC has concluded time and time again that a prior affirmative consent requirement to use CPNI was:

- unnecessary to protect competition; [12]
- at odds with efficient carrier operations;[13]
- at odds with joint marketing;[14]
- at odds with customers' desires for one-stop shopping;[15] and

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47. The FCC rejected the argument that CPNI protections were needed for "small businesses and individuals," explaining that the objectors had failed to explain how "'smaller' cellular customers could be harmed by access to information about competing services." *Id.* at 48.

[12] *Phase II Order*, 2 FCC Rcd. 3072, 3094 (1987); *Phase II Further Reconsideration Order*, 4 FCC Rcd 5927, 5929 (1989), *vacated on other grounds*, 905 F.2d 1217 (9th Cir. 1990).

[13] *See AT&T CPE Relief Order*, 102 FCC 2d 655, 678-79 ¶ 39 (1985) and *BOC CPE Relief Order*, 2 FCC Rcd. 143, 147 ¶ 29 (structural separation results in higher prices to consumers and a reduction in the quality and variety of service offerings due to an inhibition of research, development and innovation) (1987); *Phase I Order*, 104 FCC 2d at 1088 ¶ 258 (restrictions on use of customer information "impose a burden on all contacts between carriers and their customers, . . .substantially increase the difficulties attendant with providing customers a single point of contact, and prove extremely expensive to implement).

[14] *Computer III*, 3 FCC Rcd. 1150, 1162 ¶ 97 (1988) (to the extent carriers "use CPNI to identify certain customers whose needs are not being met effectively and to market an appropriate package of . . . services to such customers, customers would be benefited."); *BOC CPE Relief Order*, 2 FCC Rcd at 167 n.86 (internal CPNI use permits carriers to "engage . . . in joint planning and response to customer needs, that many customer apparently desire"); *Universal Card Order*, 8 FCC Rcd. 8782, 8786-88 ¶ 27 (1993) ("joint marketing . . . necessarily involves sharing of some customer network information").

[15] *See e.g., AT&T CPE Relief Order*, 102 FCC 2d at 692-93 ¶ 64 (noting that to deprive AT&T of CPNI use with respect to CPE sales would deprive it of the ability to offer one-stop shopping and would eliminate one of the fundamental consumer benefits associated with integration and access to such information); *BOC CPE Relief Order*, 2 FCC Rcd. 143, 147-48 ¶¶ 29, 31 (1987) (structural separation – and being cut off from CPNI – "prevent the BOCs from satisfactorily serving customers that desire integrated telecommunications systems solutions and designs. . . . [A] broad spectrum of communications users desire vendors that can be single sources for telecommunications products."); *Phase I NPRM*, 50 Fed. Reg. 33581, 33592 n. 58 (1985)

• unnecessary to protect consumer privacy.[16]

Indeed, even outside the CPNI context, the FCC has typically understood the utter impracticality of requiring affirmative customer consents and therefore has permitted notice-and-opt-out options.[17]

C. The 1996 Telecommunications Act

Against the background of the lengthy CPNI regulatory history, Congress adopted Section 222 in the 1996 Telecommunications Act. That Section applied CPNI rules to all carriers, rather than merely to AT&T, the BOCs, and GTE, as had been the FCC's previous approach. It also granted telecommunications carriers the right to use CPNI in their "provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service." 47 U.S.C. § 222(c)(1). In order for a telecommunications carrier to use CPNI for broader purposes, the use must be "required by law or with the approval of the customer" or must meet the exceptions

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("subscribers desire [ ] 'one stop shopping.'"); *1994 Public Notice*, 9 FCC Rcd. 1685 (1994) (FCC concluded that a prior authorization rule would, as a practical matter, deny to all but the largest business customers the benefits of one-stop shopping).

[16] *Computer III Phase II Recon. Order*, 3 FCC Rcd. 1150, 1163 ¶ 98 (1988) ("we anticipate that most of the BOCs network service customers . . . would not object to having their CPNI made available to the BOCs to increase the competitive offerings made to such customers"); *Phase II Order*, 2 FCC Rcd. 3072, 3094 ¶ 152 (1987) (prior authorization unnecessary to protect customer interests).

[17] For example, in the *BNA Second Recon. Order*, 8 FCC Rcd 8798, 8810 (1993), the Commission reversed a prior decision that required affirmative written authorization from customers with unlisted or unpublished numbers before local telephone companies were permitted to provide the customer's billing name and address ("BNA") information to unaffiliated telecommunications service providers. The FCC noted the "burden[some]" nature of requiring customers to "return[ ] authorization form[s]," *id.* at ¶ 68, and permitted carriers, once notification was made, "to presume that unlisted and nonpublished end users consent to disclosure and use of their BNA if they do not make [an] affirmative request" that such information not be disclosed. *Id.*

stated in Section 222(d).[18] Other than these changes, Congress made no finding that the FCC's prior approach to CPNI was inadequate or contrary to the public interest.

Most importantly for purposes of this appeal, there is no indication in Section 222(c)(1) that Congress intended the word "approval" to require before-the-fact, affirmative customer consent. Indeed, Section 222(c)(1) stands in stark contrast to Section 222(c)(2), which requires telecommunications carriers to provide CPNI in their possession to any entity designated by the customer, "upon *affirmative* written request by the customer." (emphasis added). Notably, Section 222(c)(1) does not contain the word "affirmative," nor does it contain the term "express."

Section 222 was adopted in the context of sweeping telecommunications industry reforms designed to foster competition in all telecommunications markets. Properly read in accordance with well-established customer expectations, it grants carriers in existing customer relationships broad authority to use CPNI. Customers have the power to exercise choice and control by requesting any carrier to refrain from using certain information and to constrain the potential dissemination of customer information to parties unaffiliated with the carrier absent affirmative customer consent. In this manner, Congress itself struck the appropriate balance between (i) privacy interests and (ii) competitive efficiencies and carrier rights.

D. The FCC's *NPRM*

The FCC soon sought to revise the congressional balance. As a self-effectuating statutory provision, Section 222 required no independent FCC rulemaking.[19] However, in February of 1996, several local telephone company associations advised the FCC that their members — who unlike the BOCs, AT&T, and GTE had never been subject to CPNI rules — were unclear about their obligations under Section 222 and requested the Commission to provide "guidance"

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[18] These exceptions include the initiating, rendering and billing of service; fraud prevention; and the provision of inbound telemarketing, referral or administrative services on an inbound call if the customer approves of the use of CPNI during the call.

[19] The FCC has acknowledged that Section 222 is self-executing. *See Computer III Remand Proceedings: Rules Governing Telephone Carriers' Use of Customer Proprietary Network Information*, 11 FCC Rcd. 16617, 16619 (1996).

regarding such obligations. *CPNI Order* at ¶ 6 & n. 15. Subsequently, NYNEX, a BOC, filed a petition for a declaratory ruling regarding the proper interpretation of a single aspect of Section 222 — the scope of the phrase "telecommunications service" in subsection (c). The FCC responded by initiating a broad-based rulemaking regarding the meaning of virtually the entirety of the Section. *NPRM*, 11 FCC Rcd. 12513.

In the *NPRM*, the FCC read Section 222 as revolutionizing CPNI rules for telecommunications carriers. Under the guise of its interpretive and implementing authority, the FCC created a unique regulatory regime not comparable to the rules under which every other business in the United States operates — including companies that might compete with telecommunications carriers, such as cable operators.[20] Despite the long-standing absence of a prior authorization rule with respect to the use of CPNI (with the limited exception of marketing enhanced services to businesses having more than twenty lines), the FCC in the *NPRM* repeatedly referred to "prior"[21] customer "authorization"[22] as potentially being mandated by Section 222(c)(1), even though the words "prior" or "authorization" are never used in that subsection.

The Commission also set out its tentative conclusions regarding the meaning of the term "telecommunications service" as used in Section 222. It concluded that the term should be construed to reflect three separate "traditional service distinctions":[23] local exchange (including local long-distance or short-haul toll), interexchange (also including short-haul toll) and Commercial Mobile Radio Service ("CMRS" or "wireless").[24] The significance of the categories was that, barring appropriate customer "approval," carriers would be limited in their ability to

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[20] Cable operators are free to use subscriber information internally and are obligated to secure affirmative consent only when releasing the information to unaffiliated third parties. 47 U.S.C. § 551.

[21] *NPRM* at 12523-26 ¶¶ 20, 23, 26 (prior authorization), 21 (prior approval).

[22] *Id.*

[23] *Id.* at 12523-24 ¶ 22.

[24] *Id.* at 12525 ¶ 24 and n. 60.

use CPNI derived from one service category to communicate to customers about services not in that category.

E. The Comments and Evidence Filed With the FCC

The *NPRM* raised the spectre that the FCC was proposing to disrupt seriously the carrier-customer relationship. Commentors[25] urged the Commission to reconsider its tentative views with respect to both the appropriate scope of the term "telecommunications service" and the construction of the word "approval." Various commentors argued that the word "approval" was capable of various constructions and urged the Commission to adopt a construction of the word consonant with reasonable customer expectations and commercial practices. They noted that "approval" could be construed in a variety of ways, ranging from tacit or implied approval stemming from an existing business relationship, to a notice-and-opt-out approval process in the context of an existing business relationship, to oral or written express consents. Essentially, commentors maintained that carriers should be able to determine what type of "approval" mechanism was appropriate under the self-effectuating Section 222. Certain commentors (petitioner and intervenors, for example) argued that the only "approval" mechanism that should be *prohibited* was the use of a notice-and-opt-out approval mechanism with respect to the disclosure of CPNI to unaffiliated third parties having no relationship with the customer.

1. Consumer Survey Evidence

Pacific Telesis (now a part of SBC Communications Inc.) provided the Commission with a statistically-valid public opinion survey on the use of CPNI by local telephone companies.[26] The survey was conducted under the leadership of Dr. Alan Westin,

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[25] As part of the Designated Appendix to be submitted to the Court are included relevant filings and submissions of Petitioner, Intervenors (including Pacific Bell), as well as other carriers or associations pressing the salient points addressed in this "Statement of the Case," including Bell Atlantic, GTE, USTA, and AT&T.

[26] *Public Attitudes Toward Local Telephone Company Use of CPNI*: Report of a National Opinion Survey Conducted November 14-17, 1996, by Opinion Research Corporation, Princeton, N.J. and Prof. Alan F. Westin, Columbia University, Sponsored by Pacific Telesis Group ("Westin Survey").

Professor of Public Law and Government at Columbia University and one of the world's foremost authorities on information policy and privacy. The study concluded that:

1. The public has a great deal of confidence in telephone companies (particularly local companies) and trusts them to use the personal information they collect about customers in a responsible way and to protect its confidentiality.[27]

2. Despite a generalized concern over privacy issues, large majorities of the public believe it is acceptable for businesses, and in particular local telephone companies, to communicate with their own customers to offer them additional services,[28] especially if those not wishing such communications are provided with an opt-out opportunity.[29]

3. In particular, a large public majority believes that it is acceptable for local telephone companies to communicate with their customers using CPNI data.[30] The availability of an opt out procedure brings initial approvals of local telephone company use of CPNI from the two-out-of-three respondent level up to the 80% range of public approval.[31]

4. Individuals understand "notice and opt out" procedures, and many have used them in one context or another.[32]

5. Hispanics, African-Americans, women, young adults (18-24 years of age), persons who have used an opt-out previously, and persons who order

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[27] Westin Survey, Questions 2C, 3; Analysis at Item 5, pp. 5-7 ("the finding that 77% of the American public have medium to high trust in local telephone companies gives strong support to the idea that a voluntary program of notice and opt outs in local company use of customer information for offering additional telephone services would be regarded with confidence and approval by more than three out of four Americans").

[28] *Id.* Questions 7 (businesses generally), 9 (local telephone companies); Analysis at Item 7.

[29] *Id.* Questions 8 (businesses generally), 12 (local telephone companies); Analysis at Item 8.

[30] *Id.* Questions 10-11.

[31] *Id.* Questions 11-12; Analysis at Items 8-10, pp. 8-10.

[32] *Id.* Question 5 (familiarity with notice-and-opt-out), 6 (actual use of notice-and-opt-out); Analysis at 9-10 ("The CPNI survey found the respondents who have used opt outs in other business settings are willing to change their position from initial disapproval to positive views of customer-records-based communications by local telephone companies when" follow-up questions are asked).

> many additional telephone services, all have an higher-than-average level of interest in receiving information about new services from telecommunications carriers.[33]

The Westin Survey confirmed other consumer survey evidence submitted into the record regarding customer expectations and CPNI use within the carrier-customer relationship. For example, Cincinnati Bell Telephone ("CBT") informed the Commission of a survey it conducted which demonstrated that customers were quite comfortable with carriers' using CPNI internally but believed that affirmative customer consent should be secured before CPNI could be disclosed to unaffiliated entities.[34] Like the Westin study, the CBT survey demonstrated that the "vast majority of customers surveyed (81.5%) want[ed] to be kept aware of the services" offered by their local carrier[35] and those same customers expected their carrier to use CPNI to tailor the communication.[36]

Additionally, U S WEST advised the FCC of a survey it had conducted which demonstrated that telephone customers were very interested in receiving information about packaged cable/telephone offerings.[37] Bell Atlantic cited to survey evidence demonstrating that 85.9% of respondents wanted to deal with a single carrier for all of their companies telecommunications needs[38] and noted another study documenting customer interest in one-stop shopping.[39]

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[33] *Id.* Questions 9-11; Analysis at 9.

[34] CBT Comments, CC Docket No. 96-115, filed June 11, 1996 ("CBT Comments") at 9 and n.12. The FCC cited the CBT survey in the *CPNI Order* at nn. 224 and 230.

[35] CBT Comments at 8 and n.10 and Aragon Consulting Group Attachment A.

[36] *Id.* Aragon Question USE:INFO.

[37] U S WEST Opening Comments, CC Docket No. 96-115, filed June 11, 1996 at 6.

[38] Bell Atlantic Comments, CC Docket No. 96-115, filed June 11, 1996 at 6 (citing to a 1994 NFIB Foundation business survey, "Who Will Connect Small Businesses to the Information Superhighway?", at 22 (Dec. 1994)).

[39] *Id.* at 7 (citing to 1996 IDC/LINK consumer survey, Telecommunications Brand Equity Study at 1 (1996). *See also* Bell Atlantic Reply, CC Docket No. 96-115, filed June 26, 1996 at 4 and n.11 (citing to another recent poll showing that large numbers of consumers and businesses

Furthermore, certain filing parties provided the FCC with public opinion survey evidence demonstrating that customers were comfortable with carriers sharing individually-identifiable information internally within the same corporate enterprise.[40]

2. U S WEST Affirmative Consent Trial

U S WEST undertook a statistically valid trial at the end of the 1996 and the beginning of 1997 seeking to test the feasibility of securing written and oral affirmative customer consents. The trial involved (i) letters to customers, some accompanied by incentives (ranging from $1 to $5 prepaid phone cards) asking that affirmative approval be provided either in writing or through calling a toll-free number; (ii) outbound calls to customers attempting to secure oral approvals; and (iii) requests for approval through the ordinary course of customer inbound calls to U S WEST business offices.

The results of the U S WEST survey were filed with the FCC in September of 1997 and showed the devastating effect that an affirmative customer consent requirement would have on a carrier's ability to use CPNI internally as well the barrier to communication that such a consent requirement would impose. For example, the outbound **mail** campaign produced affirmative consents in the range of 6-11%. The offering of incentives appeared to have no material impact on the frequency with which consents were provided. The cost per affirmative response was $29.32, plus whatever incentive was offered ($1 to $5 phone cards), for a maximum total of

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would defect from their current provider if they could not realize one-stop shopping, citing to Contra Cost Times, June 19, 1996 and attaching copy of article to filing).

[40] *See* Letter from Todd Silbergeld, Director, Federal Regulatory, SBC Communications Inc. to William F. Caton, Acting Secretary of the FCC, dated Oct. 20, 1997, attaching a copy of Study No. 934016, "Consumers and Credit Reporting 1994," Conducted for MasterCard International Incorporated and Visa U.S.A. Inc., Louis Harris and Associates, Inc. *See also* Letter from Gina Harrison, Director, Federal Regulatory Relations, Pacific Telesis, to William F. Caton, Acting Secretary of the FCC, dated Jan. 24, 1997, attaching a letter from Privacy & Legislative Associates, to A. Richard Metzger, Jr., Deputy Chief, Common Carrier Bureau (signed by Dr. Alan Westin and Robert R. Belair), dated Jan. 23, 1997 ("Privacy & Legislative Associates Letter"), which at Part IV, pp. 16-18 and n. 28 discusses this survey; Bell Atlantic Reply Comments (June 26, 1996) at 4-5 (mentioning that it had provided a copy of this report to FCC in 1994 and provided it again as an attachment to its Reply Comments).

$34.32. The outbound **calling** campaign produced consents in the range of 29%, with refusals in about the same amount. The cost per affirmative response was $20.66.

The largest percentage of affirmative consents were secured through the inbound calling channels in those circumstances where the customer had initiated the communication and was engaged in discussions about telecommunications.[41] Yet this approval venue is quite limited. U S WEST pointed out that it hears from at most about 15% of its customer base (between 10 and 13 million customers and access lines) in any given year, and some contacts are with the same customers. It could well take a decade or more to secure affirmative consents through this mechanism.

U S WEST also demonstrated the significance of the combined "no answer/hang up" response to its CPNI affirmative consent initiative. On average, 4.8 dialing attempts (at a cost of $5.89 per attempt) were necessary to reach a live respondent having authority to grant the necessary consent. In the outbound calling trial, U S WEST could not even establish communication with one-third of the customers that it attempted to contact. U S WEST explained that such difficulty might not necessarily be a problem in a general public opinion survey or telemarketing environment (where it is not uncommon to encounter large numbers of no answers or hang ups), because in those situations the lack of contact can be "corrected" — if larger numbers are desired — simply by increasing the size of the sample. But this solution could not be used in a CPNI affirmative consent regime. Both a "no answer" and a "hang up" count as a "no" with respect to CPNI consent.

Furthermore, U S WEST expressed its view that not only the customer "hang ups" but also some of the refusals to grant affirmative consent to use CPNI were as much the result of aversion to telemarketing as they were a considered response to the CPNI request based on its own merits. The initial call could itself have been deemed an intrusion on privacy, resulting in either a hang-up or a denial of consent.

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[41] U S WEST *Ex Parte, dated Sep. 11, 1997* at 9-10. *See also CPNI Order* at nn.390, 403 (noting this phenomena and that it had been repeated by other carriers).

With respect to the issue of customer "privacy" (the ostensible focus of Section 222), U S WEST also advised that the FCC's approach would only *increase* the volume of blanket telemarketing to subscribers because it would prevent carriers from targeting individual customers based on their likely subjects of interest. Marketing would therefore become less individualized and more intrusive in nature.

U S WEST also explained to the Commission that the low volume of responses to the requests for affirmative consents probably represented a lack of customer interest in the subject matter and a perception that the information being conveyed was not important. This explanation was supported by the about-even numbers of "yes" and "no" responses encountered across customer segments in both direct mail and oral outbound solicitations, without regard to the consumption profiles of telecommunications customers (*i.e.*, whether highly active telecommunications use or very little use). If the matter being communicated had been of interest to customers or considered important, it would be expected that highly active users would have responded differently than low-users.

U S WEST noted that previous FCC CPNI rules had rendered very few customer records unavailable to it.[42] However, as shown by the survey results, an affirmative consent requirement would prevent U S WEST from using the vast majority of its customer records to communicate with its subscribers. Furthermore, given the cost per affirmative response of up to $34.32 for outbound mail and of $20.66 for outbound calling, and given U S WEST's service population of over 11 million customers, U S WEST estimated that it would cost hundreds of millions of dollars to attempt to secure affirmative CPNI consents from its customer base. And even that immense expenditure would not assure contact with each individual, much less assure that the customer would have an interest in or consider the CPNI affirmative consent request on its merits.

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[42] U S WEST reported that, previously, only .06% of residential customers, 3.6% of small business and 33% of large business customers (a customer category that included competitors) had requested that CPNI be restricted.

3. Constitutional Analyses

U S WEST submitted a detailed First Amendment analysis by Professor Laurence Tribe (now counsel for petitioner and intervenors in this proceeding) of the First Amendment implications of an affirmative consent requirement.[43] Based on both judicial precedent and the evidence included in the then-existing record, Professor Tribe concluded that, given the clear First Amendment attributes of CPNI, Section 222 — which contains no affirmative consent requirement on its face — should not be construed to require a carrier to obtain prior affirmative customer consent before CPNI could be broadly used. Instead, Professor Tribe asserted that the Act should be interpreted as permitting an "opt-out" approval mechanism, whereby a carrier, after full and fair notice to customers, would be permitted to use CPNI across different service categories and among its affiliates, so long as customers did not object. The FCC dismissed Professor Tribe's analysis in a single footnote and two paragraphs of its *CPNI Order*. *CPNI Order* at n. 164 and ¶¶ 106-107.

In addition, various parties argued that the Commission's approach would impermissibly intrude on carriers' property rights. They noted that CPNI constitutes intellectual property belonging to carriers.[44] They urged the Commission to avoid rules that would raise constitutional questions under the Fifth Amendment.

4. Expert Views of Other Agencies

During the course of the proceedings, the FCC was advised of an analysis by the Privacy Working Group of the Clinton Administration's National Information Infrastructure Task Force

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[43] Letter from Kathryn Marie Krause, Senior Attorney for U S WEST to Mr. William F. Caton, Acting Secretary of the FCC, dated June 2, 1997 (cover letter and summary of Professor Tribe's conclusions) ("U S WEST Cover Letter"), attaching letter from Laurence H. Tribe to Messrs. A. Richard Metzger and John Nakahata and Ms. Attwood, dated June 2, 1997 ("Tribe Original Analysis"); letter from Laurence H. Tribe to Messrs. A. Richard Metzger and John Nakahata and Ms. Attwood, dated Sept. 10, 1997 (responding to MCI letter) ("Tribe Response").

[44] *See, e.g.*, Comments of USTA, CC Docket No. 96-115, filed June 11, 1996 at 8; Comments of GTE, CC Docket No. 96-115, filed June 11, 1996 at 13.

(NIITF),[45] as well as a prior study by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce.[46] Both organizations concluded that an opt-out method of customer approval was generally appropriate with respect to the commercial use of individually-identifiable information.

The NTIA Privacy Report explained that CPNI was not sensitive information, in contrast to personal information relating to health care, political persuasion, sexual matters and orientation, and personal finances, for example. NTIA Privacy Report at 20, 23, 25 n.98. The NTIA concluded that a notice-and-opt-out approach to CPNI was entirely consistent with individual privacy. It also acknowledged the procompetitive advantages associated with easy access and use of information like CPNI: "[T]he free flow of information – even personal information – promotes a dynamic economic marketplace, which produces substantial benefits for consumers and society as a whole." NTIA Privacy Report at 24, 25.

The conclusion of the NTIA Privacy Report was reinforced by a filing from the NTIA itself in the CPNI proceeding,[47] as well as by a separate filing by Dr. Westin.[48] Dr. Westin confirmed that an opt-out approval procedure for CPNI was appropriate.[49]

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[45] *See* "Privacy and the National Information Infrastructure: Principles for Providing and Using Personal Information, A Report of the Privacy Working Group" (Oct. 1995) ("Privacy Working Group Report").

[46] *See* U.S. Department of Commerce, NTIA, "Privacy and the NII: Safeguarding Telecommunications-Related Personal Information," (Oct., 1995) ("NTIA Privacy Report"). The FCC cited to this Report in its *CPNI Order* at ¶ 22 n.96. This report was referenced by various parties including U S WEST (at 16); BellSouth at 9, 14-17; SBC at 8-9, Pacific at 7-8 and Attachment A (containing a copy of the report).

[47] Reply Comments of NTIA, filed Mar. 27, 1997 at 25-27 (arguing that an opt-out process represented an appropriate process for securing customers' approvals, particularly in light of the existing business relationship).

[48] *See* Pacific Telesis, Ex Parte, CC Docket No. 96-115, dated Jan. 24, 1997 attaching the Privacy & Legislative Associates Letter at 4 (discussing both the Privacy Working Group Report and the NTIA Privacy Report, identifying as "sensitive" information (based on 1994 survey data) health and medical information, banking and credit information, insurance information).

[49] Privacy & Legislative Associates Letter at 9.

The carrier submissions to the FCC also included a copy of a recent Federal Trade Commission ("FTC") Report to Congress involving certain types of "locator" services. That report, which involved information far more sensitive than CPNI, generally endorsed the self-regulatory guidelines promulgated by the industry participants. Those guidelines included an "opt out" provision with respect to use of personally-identifiable information.[50]

F. FCC's CPNI Order

The *CPNI Order* is a 261-paragraph order purporting to implement a six-paragraph self-effectuating statutory provision. That the FCC managed to derive such a lengthy and detailed order from a statute otherwise hailed as "deregulatory,"[51] demonstrates how far the Commission strayed from Congress' intent. The FCC rejected the expert views of other agencies;[52] rejected authoritative evidence demonstrating the propriety of a notice-and-opt-out approval model; rejected the proposed statutory construction of petitioner and intervenors; and rejected the constitutional analyses submitted to the Commission.

Instead, the FCC adopted a series of rules forbidding carriers from using CPNI without prior affirmative customer consent to market and speak to both existing and future customers they believe would be receptive to new services. Under the FCC's so-called "total service approach," a carrier providing only local service to a particular customer would not be able to use CPNI, without prior affirmative customer consent, to speak to the customer regarding cellular or

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[50] Letter from Ben G. Almond, Executive Director-Federal Regulatory, BellSouth, to Ms. Magalie R. Salas, Secretary, Federal Communications Commission, dated Dec. 18, 1997 (reflecting the submission to the FCC of the FTC document, "Individual Reference Services: A Report to Congress," dated Dec. 17, 1997 and noting that the report "highlighted the use of an Opt-Out process to permit consumers access to their own non-public information").

[51] Joint Statement of Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

[52] *CPNI Order* at ¶ 94 and n.348 (specifically rejecting the Privacy & Legislative Associates submission) and n.353 (rejecting NTIA argument).

long-distance service. A carrier providing only long-distance service would be similarly constrained with respect to local or wireless services not currently provided to its customer.[53]

The result of the *CPNI Order* is that carriers who have an *existing relationship with customers* may not use CPNI associated with a customer's existing purchasing behaviors or service usage to determine that the customer would likely be interested in information about another service offering, *unless* the carrier has had a *prior* communication with the customer and has secured an affirmative consent to use the information in such manner. In short, the FCC forbade telecommunications carriers from using CPNI to speak unless they had secured prior affirmative consent from each of their millions of customers.

The FCC's rules create three unsatisfactory alternatives: (1) carriers can undertake the difficult and expensive task of seeking to secure prior affirmative consent from each of their customers; (2) carriers can stay mum and await a customer's spontaneous and affirmative inquiry of a carrier about "What's new?;" or (3) carriers can engage in a kind of "broadcast" speech to all customers, regardless of their individual purchasing characteristics and interests. Under each alternative, the *CPNI Order* bars individualized and customized speech.

The Commission reached this burdensome and impractical result by construing the term "approval" in Section 222(c)(1) to require prior affirmative consent from customers and by ruling out any other way of ascertaining customer approval — such as a notice-and-opt-out approval process. The FCC's rule is in no way commanded by the language of Section 222 or consistent with the deregulatory thrust of the 1996 Act. It is unprecedented with respect to commercial operations and speech in the United States. And it raises serious constitutional questions under both the First and Fifth Amendments.

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[53] The FCC applied a variation on this theme to a carrier's use of aggregate customer information. It held that if aggregated information was used to develop a profile of a customer most likely to be interested in a product or service that an individual customer meeting that profile could not be approached regarding an "out of service relationship" service *unless* that customer had provided prior affirmative consent for his/her CPNI to be "used" with respect to such contact. *See CPNI Order* at ¶ 149.

SUMMARY OF ARGUMENT

I. CPNI is an essential element of speech between carriers and their customers. Further, the internal sharing and use of CPNI within carriers is itself constitutionally protected speech. The *CPNI Order* violates the First Amendment by requiring that carriers secure prior affirmative consents from customers before using individually-identifiable customer information to speak with their customers on an individualized basis about services beyond the "categories" of telecommunications services to which they currently subscribe. In addition, the *CPNI Order* restricts the ability of carriers to share and use CPNI internally — to have different divisions, affiliates, and personnel within the same carrier communicate information to each other (*i.e.*, to speak to each other), absent a prior affirmative consent from the customer.

The FCC did not engage in a serious First Amendment analysis regarding the adverse speech impacts of its CPNI rules. Instead, it pretended there was no First Amendment issue on the facile theory that carriers remain free to speak to subscribers so long as they do not use CPNI to do so. But the First Amendment is concerned with "practic[al]" realities. *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 93 (1977). It is undisputed that requests for affirmative consent have extremely low response rates. The practical effect of the FCC's *CPNI Order* will be to choke off meaningful, individualized speech that depends on CPNI. It is sophistry for the Commission to say that carriers theoretically remain free to speak, while it simultaneously withdraws the essential ingredient for educated communication. Indeed, by declining to examine the First Amendment issues associated with its Order in a serious fashion, the FCC failed at the most fundamental level to engage in reasoned decision making.

II. The *CPNI Order* also raises grave questions under the Fifth Amendment's Takings Clause. The Takings Clause protects stored proprietary data. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984). CPNI is valuable intellectual property that belongs to *carriers*, not to *customers*. Yet the FCC quite cavalierly divested carriers of their property interest in CPNI. It deemed CPNI to be the customers' property and imposed a prior affirmative consent requirement that will have a devastating impact on carriers' ability to use CPNI for productive (indeed,

constitutionally protected) purposes. The Government may not, "by ipse dixit," decree that a private person no longer owns his property. "This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The FCC's analysis of the takings issues was the antithesis of reasoned decision making.

III. The *CPNI Order* is an unnecessarily severe construction of Section 222. It gratuitously raises constitutional issues where longstanding principles call for avoidance of such questions. The term "approval" in Section 222(c)(1) does not, as a matter of statutory interpretation, mandate the adoption of a prior affirmative consent requirement. Instead, the Commission could have allowed carriers to utilize a broad range of approval mechanisms, including affirmative consents if desired but also permitting notice and opt out processes where there is an existing service relationship between carrier and customer. Such approach, clearly narrower and less burdensome than that adopted by the FCC, would have fully protected customer privacy interests while avoiding constitutional questions.

For all of the above reasons, the *CPNI Order* and the accompanying rule amendments implementing the FCC's prior affirmative consent requirement for CPNI must be vacated.

ARGUMENT

STANDARD OF REVIEW

This Court has explained that it "review[s] agency action *de novo* to determine whether it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *City of Albuquerque v. Browner*, 97 F.3d 415, 424 (10th Cir. 1996), *cert. denied*, 118 S. Ct. 410 (1997); *see also Hill v. NTSB*, 886 F.2d 1275, 1278 (10th Cir. 1989) (agency's "interpretation of constitutional or statutory provisions" is "reviewed *de novo*").